100

(3)

No. 07-1553

FILED

JUL 18 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

CITY OF THE DALLES,
a political subdivision of the State of Oregon,

*Petitioner,*

v.

T.R.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oregon**

## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION


LAW OFFICE OF ROBERT E. FRANZ, JR.
ROBERT E. FRANZ, JR. OSB #73091
Email: robertfranz@qwestoffice.net
P.O. Box 62
Springfield, OR 97477
Telephone: (541) 741-8220
Facsimile: (541) 741-8234
*Counsel of Record for Petitioner*
*City of The Dalles*



COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... i

TABLE OF APPENDIX ..... i

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION ..... 1

I. Plaintiff is Bound by his Judicial Admissions that his Section 1983 Claim is Time-Barred by the Federal Accrual Rules ..... 1

APPENDIX

EXCERPTS OF PLAINTIFF-RESPONDENT, CROSS-APPELLANT'S PETITION FOR RECONSIDERATION ..... App. 1

## TABLE OF AUTHORITIES

STATUTES

42 U.S.C. § 1983 ..... *passim*

## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

### I. Plaintiff is Bound by his Judicial Admissions that his Section 1983 Claim is Time-Barred by the Federal Accrual Rules.

Plaintiff has already conceded that the federal accrual law is different than Oregon's accrual law; and that under the federal accrual law, his Section 1983 claim is time-barred.

Ever since the decision by the Court of Appeals for the State of Oregon, the plaintiff has always taken the position that his Section 1983 claim is time-barred by an application of the federal accrual rule, but that the Court of Appeals decision was incorrect – and his claim is not time-barred – because the Court of Appeals failed to apply Oregon's accrual law as a tolling provision. For example, in his Petition for Reconsideration filed in the Court of Appeals for the State of Oregon, the plaintiff set forth the following argument:

> "Plaintiff's [sic] raises three errors on reconsideration. The first springs from the subtle but significant distinction between 'accrual' of a 42 U.S.C. Section 1983 ('Section 1983') action under federal law and the 'tolling' of that claim under state law. While accrual is governed by federal principles, the Oregon discovery rule operates as a tolling provision for ORS 12.110(1) – the statute of limitations by which Section 1983 claims are governed in Oregon. This distinction between accrual

> under federal law and the application of Oregon's 'discovery rule' to toll the statute of limitations under Oregon law is vital to the resolution of this matter, because actions brought pursuant to Section 1983 use a state's general tort statute of limitations ***plus*** operative state law tolling provisions. But because this Court's opinion declaring Plaintiff's case untimely only applied the federal accrual rule, ***without considering the tolling effect of Oregon's discovery rule***, the opinion was in error." (Emphasis in Original). (App. 3 to App. 4).

As indicated above, in Plaintiff's Petition for Reconsideration to the Court of Appeals for the State of Oregon, the plaintiff agreed that his claim was time-barred by application of the federal accrual rule: "But because this Court's opinion declaring Plaintiff's case untimely only applied the federal accrual rule. . . ." (App. 3).

In other words, the plaintiff's position in the Court of Appeals and in the Supreme Court for the State of Oregon was that the federal accrual rule barred his claim. But, the Oregon accrual rule did not bar his claim. And, because the Oregon accrual rule, as a tolling provision, "trumped" the federal accrual rule, his claim was not time-barred.

Another example of plaintiff's concession that the federal accrual rule bars his Section 1983 claim is under the "Questions Presented on Reconsideration" portion of his petition for reconsideration in the Court

of Appeals for the State of Oregon. Under heading A., the plaintiff states: "Does the Oregon discovery rule . . . serve to toll the running of the statute of limitations in a Section 1983 suit **following federal accrual of the claim?"** (Emphasis Supplied). (App. 6).

In other words, the question the plaintiff was presenting to the Court of Appeals was that once the plaintiff's Section 1983 claim accrued under federal law, did Oregon's accrual law "toll" the application of the federal accrual law by allowing a longer time for the plaintiff to file his claim. If the federal and Oregon accrual rules are the same, as the plaintiff now contends for the first time, the accrual of the claim would be the same date under federal and Oregon law; and there would be no need for the Oregon accrual rule to "toll" the application of the federal accrual rule.

Another example that the plaintiff has conceded that his claim is barred by the federal accrual law appears under the heading in the Petition for Reconsideration entitled "Argument on Reconsideration." The first sentence of that argument is as follows: "Plaintiff respectfully asserts that the failure of this Court to consider the impact of Oregon's discovery rule on the tolling of the statute of limitations in Plaintiff's Section 1983 suit, **after accrual**, was error for three reasons. . . ." (Emphasis Supplied). (App. 8).

And, as pointed out by the plaintiff later in his argument: "However, 'accrual' is merely the point at

which the statute of limitations ***begins*** to run for a 1983 claim. It can be, and often is, further tolled under state law." (Emphasis in Original). (App. 11).

Now for the first time in these proceedings as argued in his Brief in Opposition to the City's Petition for a Writ of Certiorari, the plaintiff is contending that the federal accrual law and the Oregon accrual law are the same. If from the beginning, the plaintiff felt that the federal accrual law and the Oregon accrual law were the same, then why did the plaintiff argue that the Court of Appeals and the Supreme Court of Oregon had to apply the Oregon accrual law as a tolling provision. If the accrual laws were the same, there would be no reason or need to apply Oregon's accrual rule at all, much less as a tolling provision.

Plaintiff has conceded that his Section 1983 claim is time-barred, and he is now barred to contend that the federal accrual law and Oregon's accrual law rules are the same in order to persuade this Court that the City's Writ should not be granted. The Court of Appeals for the State of Oregon correctly applied the federal accrual rule, and not Oregon's accrual rule, with the end result that plaintiff's Section 1983

claim is time-barred under the federal accrual rule, just as the plaintiff has previously conceded.

Respectfully submitted,

LAW OFFICE OF ROBERT E. FRANZ, JR.
*ROBERT E. FRANZ JR. OSB #73091
Email: robertfranz@qwestoffice.net
P.O. Box 62
Springfield, OR 97477
Telephone: (541) 741-8220
Facsimile: (541) 741-8234
*Attorney for Petitioner*
*City of The Dalles*

**Counsel of Record*

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

| | |
|---|---|
| T.R., Plaintiff-Respondent, Cross-Appellant, v. THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon non-profit corporation; and JAMES DONALD TANNEHILL, Defendants below, and CITY OF THE DALLES, OREGON, a political subdivision of the State of Oregon, Defendant-Appellant, Cross-Respondent. | ) Multnomah County<br>) Circuit Court<br>) Case No. 0206-05750<br>) **CA A125742** |

**PLAINTIFF-RESPONDENT, CROSS-APPELLANT'S PETITION FOR RECONSIDERATION**

Opinion of this Court filed April 19, 2006
Appeal from the Judgment entered August 16, 2004,
and the Supplemental Judgment
entered January 6, 2005
Multnomah County Circuit Court of the State
of Oregon, the Honorable Alicia Fuchs, Judge

O'DONNELL & CLARK LLP
Kelly Clark, OSB #83172
Kristian Roggendorf,
OSB #01399
1650 N.W. Naito Pkwy,
Suite 302
Portland, Oregon 97209
Telephone: (503) 306-0224
Facsimile: (503) 306-0257
Of Attorneys for Plaintiff-
Respondent Cross-Appellant

LAW OFFICES OF
ROBERT E. FRANZ, JR.
Robert E. Franz, Jr.,
OSB #73091
Jason Montgomery,
OSB #02400
PO Box 62
Springfield, Oregon 97477
Telephone: (541) 741-8220
Facsimile: (541) 741-8234
Of Attorneys for
Defendant-Appellant
Cross-Respondent City
of The Dalles

May 17, 2006

* * *

who were also there to testify. Tr. at 977-983. It began to dawn on Plaintiff that Tannehill's activities had not been completely secret – that City officials may have known or had reason to know of Tannehill's proclivities. During the course of Tannehill's criminal trial, Plaintiff's symptoms escalated to such a degree that he became concerned about the effect Tannehill's abuse had on his life and sought professional help, including legal consultation.

4. Plaintiff brought this suit in June of 2002, approximately nine months after he had made the discoveries referred to in paragraphs 2 and 3, above.

5. This Court held that as a matter of law under *United States v. Kubrick,* 444 U.S. 111 (1979), and other cases, that "only one conclusion" could be drawn from the facts above – "any reasonable person would have acted on those facts" and brought suit against the City within two years of the abuse.

B. OVERVIEW OF THIS MOTION

Plaintiff's [sic] raises three errors on reconsideration. The first springs from the subtle but significant distinction between "accrual" of a 42 U.S.C. Section 1983 ("Section 1983") action under federal law and the "tolling" of that claim under state law. While accrual is governed by federal principles, the Oregon discovery rule operates as a tolling provision for ORS 12.110(1) – the statute of limitations by which Section 1983 claims are governed in Oregon. This distinction between accrual under federal law and the application of Oregon's "discovery rule" to toll the statute of limitations under Oregon law is vital to the resolution of this matter, because actions brought pursuant to Section 1983 use a state's general tort statute of limitations ***plus*** operative state law tolling provisions. But because this Court's opinion declaring Plaintiff's case untimely only applied the federal accrual rule, ***without considering the tolling effect of Oregon's discovery rule***, the opinion was

in error. Seen in this light, it is also apparent that the United States Supreme Court's stated policy reasons for its reasoning in *United States v. Kubrick* do not apply in the child abuse context.

Second, well-established mental health phenomena make plain that Plaintiff in this case was in no position to recognize his "injury" – let done reasonably be expected to "discover" or communicate with a professional about a legal claim – in the time allotted by the *Kubrick* accrual doctrine. Stated plainly, child sexual abuse itself creates a barrier and prevents a victim from personally dealing with the abuse or discussing it with others. Thus, accrual under *Kubrick* cannot logically or fairly be applied to sexual abuse in a Section 1983 claim; it is simply a different kind of case.

Third, only by using the mental health realities of the child abuse context and the Oregon discovery rule can the Ninth Circuit precedent of *Plumeau v. School Dist. No. 40 County of Yamhill,* 130 F.3d 432 (9th Cir 1997) – holding that a minor student's Section 1983 claim was timely filed seven to ten years after her sexual abuse by a school janitor – be squared with *Kubrick* and the Ninth Circuit accrual case of *Dyniewicz v. United States,* 742 F.2d. 484, 486 (9th Cir.1984), both of which hold that the accrual of federal claims begins at the moment where a claimant becomes aware of a physical injury and its immediate cause.

Plaintiff recognizes that petitions for reconsideration based on "legal issues already argued in the parties' briefs and addressed by the Court of Appeals are disfavored." ORAP 6.25(1)(e). These specific legal issues, however – including the specific points on which this Court's opinion hinge – were not directly discussed in the briefing below, though *Kubrick* was cited by Plaintiff in the discussion concerning when a Section 1983 claim accrues. The general issue of the statute of limitations was also discussed in briefing below, but this Court's opinion focused squarely on the impact of *Kubrick* without considering cases relating to the question of accrual versus tolling. Also, given the rulings below related to Plaintiff's discovery of his claims against the City, there was no argument needed to explain the nature of delayed discovery in child abuse cases or in this case in particular. Thus, the issue of how the Oregon discovery rule affects the tolling of the statute of limitations for Plaintiff's Section 1983 claim was not briefed or argued either in this Court or below. Additionally, there has been nothing in the way of argument or briefing concerning the policy considerations that drove *Kubrick,* the distinct nature of child sexual abuse and its psychological effect on children and the resulting implications for the accrual of claims under Section 1983, or the impact of psychological avoidance mechanisms arising from child abuse the details of the Ninth Circuit ruling in *Plumeau.*

## II. Questions Presented on Reconsideration

A. Does the Oregon discovery rule – applicable to ORS 12.110(1) under *Berry v. Branner*, 245 Or. 307, 421 P.2d 996 (1966) – serve to toll the running of the statute of limitations in a Section 1983 suit following federal accrual of the claim?

B. Do the psychological realities of child abuse, whereby a child sexual abuse victim is faced with avoidance mechanisms brought about by the abuse itself, prevent the application of an accrual doctrine of the type set out in *Kubrick* and its progeny and applied by the Court here, given the stated policy considerations underlying the reasoning in those cases?

C. Can the facts and holding of *Plumeau* be squared with this Court's opinion concerning accrual, as well as *Kubrick* and *Dyniewicz* in light of the seven year delay in bringing suit by the *Plumeau* plaintiff, when the only tolling provision applicable to that case – other than the discovery rule or a recognition of the avoidance mechanisms of child sexual abuse – limited tolling of an accrued claim to a period of five years at most?

## III. Concise Summary of Argument

A. The discovery rule in Oregon is considered to be a tolling provision as well as a rule of accrual. Because Section 1983 claims incorporate state law tolling rules, the Oregon discovery rule operates and

serves to make Plaintiff's delayed discovery of the cause of action against Defendant City of the Dalles reasonable and legally permissible.

B. Sexual abuse of a child by a trusted adult triggers various psychological avoidance mechanisms that prevent child sex abuse victims from facing the reality of their abuse and its impact on their emotional and mental health, ofttimes for decades after the abuse ends. Although they may be aware of the fact of the abuse itself, child sexual abuse victims cannot be said to have knowledge of the legal "injury" at the time of the abuse for purposes of the accrual of legal claims.

C. Because the minority tolling provisions extend the relevant statute of limitations only for five years, and because no other tolling provision would appear to apply to ORS 12.110 except for the discovery rule, the delay of seven years between the last instance of abuse in *Plumeau* and the filing of *Plumeau's* Section 1983 suit would appear untimely. Because the Ninth Circuit held *Plumeau's* filing to be timely based on discovery at the time of the victim-plaintiff's emotional breakdown, one must conclude that the Ninth Circuit has applied Oregon's discovery rule as a tolling provision to Section 1983 claims. This Court should do likewise in Plaintiff's case.

## IV. ARGUMENT ON RECONSIDERATION

Plaintiff respectfully asserts that the failure of this Court to consider the impact of Oregon's discovery rule on the tolling of the statute of limitations in Plaintiff's Section 1983 suit, after accrual, was error for three reasons – first, it failed to account for the application of the Oregon discovery rule as a tolling provision; second, it failed to recognize the psychological realities of child abuse which inform a plaintiff's knowledge of injury, and third, without the discovery rule, the precedent of *Plumeau* makes little logical sense. This brief addresses these issues in turn. However, a discussion of the structure of Section 1983 and the accrual/tolling/statute of limitations distinction is necessary as a preliminary matter.

### A. *APPLICATION OF THE DISCOVERY RULE TO PLAINTIFF'S CLAIM*

#### 1. *The Structure of Section 1983*

The United States Supreme Court has noted that the purpose of Section 1983 is to provide compensatory relief to those deprived of their federal rights by state actors. *Felder v. Casey,* 487 U.S. 131, 141 (1988). While Section 1983 is a federal statute providing a civil cause of action for the violation of constitutional rights, there are virtually no procedural rules in federal law that govern the operation or timeliness of a Section 1983 cause of action. *Board of Regents of University of State of N. Y. v. Tomanio,* 446 U.S. 478,

* * *

169 F.3d 608, 610 (9th Cir. 1999) ("we apply the state's general residual statute of limitations and state rules which toll the running of that statute"). "Tolling" means to "suspend or stop temporarily[,] as the statute of limitations is tolled . . . during the plaintiffs minority." BLACK'S LAW DICTIONARY 1488 (7th ed.1999). In addition to minority, Oregon law also provides for, among other tolling periods, tolling during periods of insanity.[2] *See* ORS 12.160. Tolling for minority and insanity is limited under Oregon law to five years after the claim accrues, but during the time that one is a minor or under age, the statute of limitations will not run on the person's claim. It is Section 1983's appropriation of tolling doctrines that is at issue in this petition for reconsideration. However, one must first must [sic] establish when ORS 12.110(1) began to run in this case before examining its tolling. The first step therefore is to establish when ORS 12.110(1) began to run – *i.e.* when Plaintiffs claim "accrued."

2. *Accrual of a Claim in Section 1983 Cases*

"Accrual" means when an action may be maintained on a particular cause; that is, a claim accrues at the point "whenever one person may sue another." *Berry v. Branner*, 245 Or at 311-12; BLACK'S LAW

---

[2] The tolling provisions for incarceration formerly found in ORS 12.160 were removed by the Legislature in 1997.

DICTIONARY 21 (7th ed.1999). "Federal law determines when a cause of action accrues and [therefore when] the statute of limitations begins to run for a § 1983 action." *Elliott v. City of Union City*, 25 F.3d 800, 801-02 (9th Cir 1994) (citation omitted). For example, in *Kubrick,* accrual occurred when a plaintiff went deaf from a dose of antibiotics and knew that the antibiotics caused the deafness, not when he learned that the application of antibiotics was medical malpractice. *Kubrick*, 444 U.S. at 118.[3]

Indeed, as noted by this Court in its opinion in this case – and not challenged in this motion – under federal law a claim accrues, and the statute of limitations begins to run "when the plaintiff knows, or should know, of the injury which is the basis of the cause of action." *Johnson v. State of California*, 207 F.3d at 653, *citing Kimes v. Stone,* 84 F.3d 1121, 1128 (9th Cir. 1996); *See also United States v. Kubrick,* 444 U.S. at 113; *Dyniewicz v. United States,* 742 F.2d at 486 (9th Cir.1984) (Federal Tort Claims Act claims untimely where decedents' children filed only after they discovered negligence more than two years after accident, because immediate physical cause of the injury (the accident) was discovered at the time it

---

[3] It should be noted that even under *Kubrick,* accrual is subject to a federal "discovery rule." *Kubrick*, 444 U.S. at 120 ("the general rule . . . has been that a tort claim accrues at the time of the plaintiff's injury, although it thought that in medical malpractice cases the rule had come to be that the 2-year period did not begin to run until the plaintiff has discovered both his injury and its cause")

occurred; ignorance of the involvement of United States employees is irrelevant to accrual). However, "accrual" is merely the point at which the statute of limitations ***begins*** to run for a 1983 claim. It can be, and often is, further tolled under state law.

3. *Tolling of the Statute of Limitations under Section 1983*

As noted above, Section 1983 cases are governed not only by state residual tort statutes of limitation, but also by any tolling provisions found in state law that relate to that statute of limitations. *See* 42 U.S.C. § 1988; *Hardin v. Straub*, 490 U.S. at 544 (applying Michigan's incarceration tolling provision); *Board of Regents, Univ. of N. Y. v. Tomanio,* 446 U.S. at 490-91 (applying New York's absence of a tolling provision for pursuing related litigation in separate courts). *See also Elliott v. City of Union City,* 25 F.3d 802-03 (applying California's incarceration tolling provision). Applicable tolling provisions in Section 1983 are not confined to statutory provisions, but may include common law tolling doctrines. *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 694 (9th Cir 2003) (applying California's common law equitable tolling provision). This is what distinguishes the precedents of *Johnson, Kimes, Kubrick* and *Dyniewicz* – all involving Federal Tort Claims Act causes of action which do not incorporate state tolling provisions – from Plaintiff's Section 1983 claim. Because Section 1983 utilizes state tolling provisions, the answer to

the accrual question is not the final word on a timeliness question as it is under the Federal Tort Claims Act. With that, Plaintiff turns to the question of the discovery rule as a tolling provision under Oregon law.

4. *The Oregon Discovery Rule Applies to ORS 12.110(1), and Operates Both as an Accrual Provision As Well As a Tolling Provision.*

The discovery rule under federal law concerns accrual only and requires that "plaintiff has discovered both his injury and its cause" before a claim will accrue. *Kubrick*, 444 U.S. at 120. Yet the discovery rule in Oregon both delays accrual and "has the effect of tolling the commencement of [statutes of limitation] under certain circumstances." *F.D.I.C. v. Smith,* 328 Or. 420, 428, 980 P.2d 141 (1999). For instance, the Oregon discovery rule allows a Plaintiff to bring suit a decade after child abuse if the plaintiff discovers the causal connection between abuse and later psychological problems and files suit within the statutory period for doing so. *See Jasmin v. Ross*, 177 Or App 210,

* * *